

From: (b) (6)
Sent: Wednesday, April 25, 2012 7:27 PM
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Subject: 380-5

Ma'am. Ultimately, the United States agrees that AR 380-5 is punitive in nature; however just because a regulation is punitive in nature, not all provisions within the regulation are punitive. For example, AR 25-2 sets forth "bolded" paragraphs which highlight the exact provisions which are punitive. There are portions of AR 380-5 that are punitive in nature, but those provisions follow after Chapter 1, with the specified prohibited conduct, such as storing classified information at a residence (paragraph 7-6), knowingly or willfully disclosing classified information (paragraph 10-11 through -23), or negligently violating the regulation (paragraph 10-10). Specifically, Chapter 1 of AR 380-5 is titled "General Provisions and Program Management." Other provisions within Chapter 1 of AR 380-5 include an explanation of abbreviations and terms (1-3), the responsibilities of the Secretary of the Army (1-4), the scope of the regulation (1-10), background information (1-14). Most regulations, like AR 380-5, contain background information on the regulation upfront, to include AR 380-5, para. 1-21. Paragraph 1-21, Subsection (b) thereof sets out the sanctions available for disclosing such information, to include, without limitation, warning, reprimand, action under UCMJ, and action under applicable criminal law. See AR 380-5, para. 1-21b. The United States does not dispute that other provisions contained within AR 380-5 are punitive. See AR 380-5, para. 10-10 (subjecting persons to administrative sanctions if they negligently disclose, to unauthorized persons).

However, if the Court finds Paragraph 1-21 is punitive, then Specification 1 of Charge II is not preempted by Article 92. In addition to what has already been provided in the government's written response and argument today, Paragraph 1-21 does not hold a Soldier criminally responsible for wrongful and wantonly causing intelligence to be published on the internet, but only the knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. In McGuinness, the Court of Military Appeals actually held that the Navy regulation (comparable to AR 380-5) which prohibited storing classified information at an individual's residence was not preempted by a violation of 18 USC 793 for the same type of offense. The Court stated that nothing in the legislative history of Article 92 provided that Congress intended general orders / regulations to occupy the field for offenses that could be charged under Article 134. Although the McGuinness Court applied this standard to a Clause 3 offense (18 USC 793(e)), the United States cannot find any contrary case law which would not apply this to a Clause 1 and 2 offense. Finally, there is no evidence that the Army intended AR 380-5 to cover the field for causing intelligence to be published on the internet or even disclosure of classified, or sensitive information or intelligence to unauthorized individuals, evidenced by

multiple other punitive laws/regulations that touch on this subject, such as AR 530-1 (paragraph 2-1), Articles 104, 106a.

In McGuiness, the Court found that paragraph 7-6, AR 380-5 was punitive. Paragraph 7-4 if found within the same section as paragraph 7-6 and contains similar prohibiting language about storing classified information.

Vr Maj Fein